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11 **UNITED STATES DISTRICT COURT**  
12 **NORTHERN DISTRICT OF CALIFORNIA**

13 WILDEARTH GUARDIANS,  
14  
15 Plaintiff,

16 v.

17 LISA P. JACKSON, in her official  
18 capacity as Administrator of the United  
19 States Environmental Protection Agency,  
20 Defendant.

Civil Action No. 11-CV-5651-YGR  
And consolidated case No. 3:11-CV-  
05694-YGR

**DEFENDANT'S NOTICE AND  
CROSS-MOTION FOR SUMMARY  
JUDGMENT; OPPOSITION TO  
PLAINTIFFS' MOTION FOR  
SUMMARY JUDGMENT;  
MEMORANDUM IN SUPPORT  
THEREOF**

Hearing: July 3, 2012  
Time: 2:00 p.m.  
Judge: Hon. Yvonne Gonzales Rogers

23 **NOTICE OF MOTION**

24 Please take notice that on July 3, 2012 at 2:00 p.m. or as soon thereafter as counsel  
25 can be heard, Defendant Lisa P. Jackson, in her official capacity as Administrator of the  
26 United States Environmental Protection Agency ("EPA") will move this Court, located in the  
27 United States Court House located at 1301 Clay Street, Oakland, California, for summary  
28

1 judgment on the claims of Plaintiffs WildEarth Guardians, Midwest Environmental Defense  
 2 Center, and Sierra Club (collectively, "Plaintiffs") against EPA.

### 3 **RELIEF REQUESTED**

4 The relief EPA seeks is:

5 (1) an order entering summary judgment in favor of EPA on Plaintiffs' claim that  
 6 EPA has failed to issue a finding of failure to submit an "infrastructure" state  
 7 implementation plan ("SIP") for the 2008 ozone national ambient air quality  
 8 standards ("NAAQS") for the states of Delaware, Idaho, Indiana, Oregon, and West  
 9 Virginia (for CAA sections 110(a)(2)(A)-(C), (D)(i)(II), (D)(ii), (E)-(H), and (K)-(M)  
 10 only); and dismissing those claims pursuant to Fed. R. Civ. P. 56.

11 (2) an order directing EPA to:

- 12 a. By no later than January 4, 2013 sign a notice finding that the following  
 13 States have failed to submit "infrastructure" SIPs for the 2008 ozone  
 14 NAAQS: Arizona, Arkansas, California, Colorado, Connecticut, District  
 15 of Columbia, Hawaii, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland,  
 16 Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska,  
 17 Nevada, New Hampshire, New Jersey, New Mexico, New York, North  
 18 Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Puerto Rico,  
 19 Rhode Island, South Dakota, Texas, Utah, Vermont, Virginia,  
 20 Washington, West Virginia (for CAA section 110(a)(2)(D)(i)(I) only),  
 21 Wisconsin, and Wyoming;  
 22 b. By no later than January 4, 2013, sign for publication in the Federal  
 23 Register a notice of the Agency's final action pursuant to section 110(k) of  
 24 the Clean Air Act, 42 U.S.C. § 7410(k), approving, disapproving, or  
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1 approving in part and disapproving in part (a) the infrastructure SIP  
2 submittal submitted by Kentucky dated September 8, 2009 addressing the  
3 2008 ozone NAAQS and (b) the infrastructure SIP submittal submitted by  
4 Tennessee dated October 19, 2009 addressing the 2008 ozone NAAQS.  
5

6  
7 EPA further requests that any order issued for purposes of the requirements of  
8 paragraphs (2)(a) and (b) above include the following clarification: "It is understood that an  
9 infrastructure SIP does not include that portion of section 110(a)(2)(C), 42 U.S.C. §  
10 7410(a)(2)(C), that pertains to nonattainment area plan requirements under part D. It is  
11 further understood that in the event that a state makes a complete infrastructure SIP  
12 submission meeting the requirements of section 110(a)(2), as applicable, in whole or in part,  
13 then EPA no longer has the legal authority or the obligation pursuant to section  
14 110(k)(1)(B), 42 U.S.C. § 7410(k)(1)(B), to make a finding of failure to submit with respect  
15 to that state and to those elements of the infrastructure SIP submission for which the state  
16 made such submission. In addition, it is understood that if a state withdraws, in whole or in  
17 part, a submitted infrastructure SIP, then EPA no longer has the legal authority or the  
18 obligation pursuant to section 110(k), 42 U.S.C. § 7410(k) to take action on such SIP."  
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# MEMORANDUM OF POINTS AND AUTHORITIES

## INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 56 and the Court's May 9, 2012 Order (Dkt. No. 41), Defendant Lisa Jackson, Administrator of the United States Environmental Protection Agency ("EPA" or the "Agency") hereby files this Memorandum in support of (1) EPA's opposition to the two surviving claims in the joint motion for summary judgment filed by Plaintiffs WildEarth Guardians, Midwest Environmental Defense Center, and Sierra Club (collectively, "Plaintiffs") on April 13, 2012 (Dkt. No. 36)<sup>1</sup> and (2) EPA's cross-motion for summary judgment.

In support of the two surviving claims in Plaintiffs' motion for summary judgment, Plaintiffs argue that EPA has failed to carry out two non-discretionary duties mandated by the Clean Air Act ("CAA" or the "Act"). First, Plaintiffs allege that EPA failed to perform a non-discretionary duty by not issuing a "finding of failure to submit" for 44 states that have not submitted an "infrastructure" state implementation plan ("SIP") for the 2008 ozone national ambient air quality standards ("NAAQS"). *See* Claim One, Second Amd. Compl. at ¶¶ 21-32 (Dkt. No. 30, Mar. 6, 2012); Plfs. Mem. in Support of Mot. for Summ. J. (hereinafter "Plfs. Mem.") at 13-19 (Dkt. No. 36, Apr. 13, 2012). Second, Plaintiffs allege that EPA failed to take final action on the 2008 ozone NAAQS infrastructure SIPs submitted by Kentucky and Tennessee as required by 42 U.S.C. § 7410(k)(2) and (3). *See* Claim Three, Second Amd. Compl. at ¶¶ 38-47 (Dkt. No. 30, Mar. 6, 2012); Plfs. Mem. at 21-24 (Dkt. No. 36, Apr. 13, 2012). Plaintiffs ask the Court to impose a schedule on the Agency requiring

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<sup>1</sup> On May 7, 2012, the Court granted EPA's motion to dismiss Plaintiffs' claims that EPA had failed to promulgate regulations concerning prevention of significant deterioration with respect to revised ozone air quality standards. *See* Order (Dkt. No. 40). The Court found that section 166(a) of the CAA, 42 U.S.C. § 7476(a), does not impose a non-discretionary duty to EPA to promulgate revised PSD regulations for ozone, and accordingly that the Court lacked subject matter jurisdiction over the claim.

1 EPA to issue the findings of failure to submit within 30 days and to take final action on the  
 2 Kentucky and Tennessee SIP submittals within 5 months. Plfs. Mem. at 24 (Dkt. No. 36,  
 3 Apr. 13, 2012); Plfs. Proposed Order (Dkt. No. 37-8, Apr. 13, 2012).

4 EPA does not contest liability on these two claims, except as to the SIP submittals  
 5 from five of the 44 states that Plaintiffs allege in Claim One have not submitted an  
 6 infrastructure SIP for the 2008 ozone NAAQS. Delaware, Idaho, Indiana, Oregon, and West  
 7 Virginia have in fact submitted the contested SIPs or portions of the contested SIPs, and  
 8 consequently EPA can have no duty to issue a finding of failure to submit. EPA Facts 1-5.<sup>2</sup>  
 9 Thus, EPA moves for summary judgment in EPA's favor regarding the 2008 ozone NAAQS  
 10 infrastructure SIP submissions from those five states. Otherwise, EPA does not dispute that  
 11 it has not issued findings of failure to submit for submissions from the remaining 40 states  
 12 that Plaintiffs allege have not submitted an infrastructure SIP for the 2008 ozone NAAQS  
 13 (hereinafter "the 40 states"), nor that the Agency has missed the statutory deadline to take  
 14 final action on the 2008 ozone NAAQS infrastructure SIPs submitted to EPA by Kentucky  
 15 on September 8, 2009 and by Tennessee on October 19, 2009 (hereinafter, the "Kentucky  
 16 infrastructure SIP" and "Tennessee infrastructure SIP").<sup>3</sup> Therefore, only issue to be  
 17 resolved on summary judgment on those claims is remedy, i.e., what schedule the Court  
 18 should impose on EPA to issue the findings of failure to submit and to take final action on  
 19  
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22  
 23 <sup>2</sup> West Virginia has submitted portions of the contested SIP. EPA Fact 5. Therefore, EPA  
 24 moves for summary judgment as to those portions of the SIP that West Virginia has submitted,  
 and does not contest liability as to those portions of the SIP that West Virginia has not submitted.

25 <sup>3</sup> The states for which EPA does not contest Plaintiffs' allegations that EPA has not issued a  
 finding of failure to submit an infrastructure SIP addressing the 2008 ozone NAAQS are:  
 26 Arizona, Arkansas, California, Colorado, Connecticut, District of Columbia, Hawaii, Illinois,  
 Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri,  
 27 Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North  
 Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Puerto Rico, Rhode Island, South  
 Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia (for CAA section  
 28 110(a)(2)(D)(i)(I) only), Wisconsin, and Wyoming. For ease of reference, EPA refers to the  
 states in this list as "the 40 states."



1 the Kentucky and Tennessee infrastructure SIPs. Plaintiffs ask this Court (1) to direct EPA  
 2 to issue findings of failure to submit within 30 days of the issuance of the Court's order and  
 3 (2) to propose action on the Kentucky and Tennessee infrastructure SIPs within 3 months and  
 4 to take final action within 5 months of the issuance of the Court's Order. However, in light  
 5 of budgetary and resource constraints and the numerous other statutorily required mandatory  
 6 duties EPA must undertake in the coming months, the most expeditious schedule by which  
 7 EPA could issue the findings of failure to submit and take final action on the Kentucky and  
 8 Tennessee infrastructure SIPs is January 4, 2013.

10 EPA respectfully requests that the Court grant summary judgment in EPA's favor  
 11 with regard to Plaintiffs' claim that EPA has failed to issue a finding of failure to submit for  
 12 the 2008 ozone NAAQS infrastructure SIPs for Delaware, Idaho, Indiana, Oregon, and  
 13 portions of the West Virginia SIP submission. EPA further requests that the Court resolve  
 14 the remainder of this case by issuing an order that EPA satisfy its non-discretionary duties  
 15 under the CAA by: (1) signing on or before January 4, 2013, findings of failure to submit for  
 16 any of the 40 remaining states at issue in this case that have not by that date submitted 2008  
 17 ozone NAAQS infrastructure SIPs to EPA; and (2) signing on or before January 4, 2013, a  
 18 final rule taking action on the 2008 ozone NAAQS infrastructure SIPs submitted by  
 19 Kentucky and Tennessee to EPA.  
 20  
 21

## 22 **BACKGROUND**

### 23 **I. STATUTORY AND REGULATORY BACKGROUND**

#### 24 **A. The Clean Air Act's "Infrastructure" State Implementation Plans**

25 The Clean Air Act, 42 U.S.C. §§ 7401-7671q, establishes a comprehensive program  
 26 for controlling and improving the nation's air quality through shared Federal and state  
 27 responsibility. The Act requires EPA to establish, review, and revise National Ambient Air  
 28

1 Quality Standards (“NAAQS”) for air pollutants that it determines may reasonably be  
 2 anticipated to endanger public health or welfare. 42 U.S.C. §§ 7408-7409. States have  
 3 primary authority for ensuring that their air quality meets the NAAQS. 42 U.S.C. § 7407(a).  
 4 The Act requires the States to develop state implementation plans (“SIPs”) that provide for  
 5 the implementation, maintenance and enforcement of the NAAQS in each air quality control  
 6 region within the State. *Id.* § 7410(a)(1) & (a)(2). These SIPs are referred to as  
 7 “infrastructure” SIPs because they are intended to address basic structural requirements for  
 8 SIPs for a new or revised NAAQS. The States must submit such SIPs within no more than  
 9 three years after promulgation or revision of a NAAQS. *Id.* § 7410(a)(1).

11 Section 110(a)(2) lists specific elements that states must meet, as applicable, in the  
 12 general infrastructure SIP submissions. 42 U.S.C. § 7410(a)(2). The requirements include  
 13 basic SIP infrastructure elements such as provisions to provide for monitoring, enforcement,  
 14 and general legal authority, which are designed to assure attainment and maintenance of the  
 15 NAAQS. EPA interprets the Act such that two elements identified in section 110(a)(2) are  
 16 not governed by the three-year submission deadline of section 110(a)(1) because they are  
 17 related to the Act’s nonattainment provisions, which have different due dates for submission.  
 18 These two elements are: (1) section 110(a)(2)(C) to the extent it refers to nonattainment new  
 19 source review permit programs that are required under part D, Title I of the CAA; and (2)  
 20 section 110(a)(2)(I), which pertains to the nonattainment planning requirements of part D,  
 21 Title I of the CAA. *See* 73 Fed. Reg. 16,205, 16,207 (Mar. 27, 2008).<sup>4</sup>

## 24 **B. EPA Review of State Implementation Plan Submissions**

25 Section 110(k) of the CAA sets forth the process by which EPA must review SIP  
 26 submissions or revisions. 42 U.S.C. § 7410(k). Pursuant to section 110(k)(1)(B), within 60  
 27

28 <sup>4</sup> Plaintiffs note that for purposes of their summary judgment motion, they do not dispute EPA’s position regarding these two provisions. *See* Plfs. Mem. at 4.

1 days of EPA's receipt of a SIP submission, EPA must determine whether the SIP submission  
 2 meets the completeness criteria promulgated by the Agency in 40 C.F.R. part 51 under  
 3 section 110(k)(1)(A) of the Act. 42 U.S.C. § 7410(k)(1)(B), (A). If EPA does not determine  
 4 that the submission is incomplete within six months of receipt, the SIP submission is deemed  
 5 complete by operation of law. *Id.* § 7410(k)(1)(B). If EPA determines that the SIP  
 6 submission is complete, or if the SIP submission is deemed complete by operation of law,  
 7 EPA must act to approve, disapprove, or approve in part and disapprove in part, the SIP  
 8 submission within 12 months of the completeness determination. *Id.* § 7410(k)(2)-(4). If a  
 9 State fails to submit a SIP required by the CAA, EPA must promulgate a federal  
 10 implementation plan ("FIP") within two years of making the finding that the state failed to  
 11 submit. *Id.* § 7410(c).

## 12 **II. FACTUAL BACKGROUND**

13  
 14 EPA established a NAAQS for ozone in 1979, 44 Fed. Reg. 8202 (Feb. 9, 1979), and  
 15 subsequently has periodically reviewed and revised the ozone NAAQS. As a result of the  
 16 most recent review, EPA issued a revised ozone NAAQS on March 12, 2008. 73 Fed. Reg.  
 17 16,511 (Mar. 27, 2008) (codified at 40 C.F.R. § 50.15). The deadline for States to submit  
 18 infrastructure SIPs to EPA for the 2008 ozone NAAQS was March 12, 2011 (three years  
 19 after the date of promulgation of the 2008 NAAQS). 73 Fed. Reg. 16,436, 16,503 (Mar. 27,  
 20 2008). As of May 29, 2012, Delaware, Idaho, Indiana, Kentucky, Tennessee, Oregon, and  
 21 West Virginia had submitted to EPA infrastructure SIPs (or portions of those SIPs in West  
 22 Virginia's case) for the 2008 ozone NAAQS. EPA Facts 1-5; EPA Response to Plfs.  
 23 Statement of Facts ("EPA Response to Plfs. SOF") 74, 77.<sup>5</sup>

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 27  
 28 <sup>5</sup> States in addition to Delaware, Idaho, Indiana, Kentucky, Tennessee, Oregon, and West Virginia have submitted infrastructure SIPs intended to address the 2008 ozone NAAQS to EPA, but Plaintiffs have not asserted claims against EPA regarding those states. *See* Second Amd.

## STANDARD OF REVIEW

Summary judgment is to be granted if the movant shows that there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The party moving for summary judgment must identify those portions of “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,” which it believes demonstrate the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party meets its initial responsibility, the burden then shifts to the non-moving party to establish the existence of a genuine issue of material fact. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986).

Summary judgment is appropriate where liability is uncontested and the only issue for the Court to address is to fashion an equitable remedy. *Sierra Club v. Johnson*, 444 F. Supp. 2d 46, 52 (D.D.C. 2006); *American Lung Ass’n v. Browner*, 884 F. Supp. 345, 346 (D. Ariz. 1994).

## ARGUMENT

Plaintiffs’ motion for summary judgment seeks summary judgment on three claims: (1) the claim that EPA has failed to issue findings of failure to submit infrastructure SIPs for the 2008 NAAQS from 44 states<sup>6</sup>; (2) the claim that EPA has failed to complete a rulemaking process to update the Prevention of Significant Deterioration (“PSD”) regulations for the 2008 ozone NAAQS; and (3) the claim that EPA has failed to take action on the specific 2008 ozone NAAQS infrastructure SIP submittals by Kentucky and Tennessee. Plfs.

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Compl. ¶¶ 29, 32 (excluding Mississippi, South Carolina, Florida, Alabama, and Alaska from Plaintiffs’ Claim One regarding the findings of failure to submit).

<sup>6</sup> Although Plaintiffs’ motion for summary judgment refers to “42 states,” *see* Plfs. Mem. at 2 n.2 & 13, the list includes 44 states. EPA notes that the CAA defines “State” to include the District of Columbia and the Commonwealth of Puerto Rico, both of which are included in Plaintiffs’ list of 44 states. *See* 42 U.S.C. § 7602(d); Plfs. Mem. at 2 n.2.

1 Mem. at 2. Because the Court granted EPA's motion to dismiss the second of the claims  
 2 (regarding PSD regulations, *see* Order Granting Def.'s Mot. to Dismiss (Dkt. No. 40, May 7,  
 3 2012)), EPA now moves for summary judgment and responds to Plaintiffs' motion for  
 4 summary judgment with regard only to the first and third claims.

5  
 6 Regarding the first claim, EPA does not contest liability as to 40 of the 44 states on  
 7 which Plaintiffs seek summary judgment.<sup>7</sup> However, among the 44 states the Plaintiffs name  
 8 in their Complaint, the states of Delaware, Idaho, Indiana, and Oregon have already  
 9 submitted infrastructure SIPs, and West Virginia has submitted portions of such a SIP for the  
 10 2008 ozone NAAQS. EPA Facts 1-5.<sup>8</sup> With regard to the SIP submissions from these five  
 11 states, EPA therefore moves for summary judgment in its favor. EPA should not be ordered  
 12 to issue a finding of failure to submit a SIP as to States that have in fact already submitted the  
 13 required SIP. Regarding the second claim, EPA admits that it has not taken action pursuant  
 14 to 42 U.S.C. § 7410(k) on the specific infrastructure SIP submittals for the 2008 ozone  
 15 NAAQS at issue in this case submitted by Kentucky on September 8, 2009 (the "Kentucky  
 16 Infrastructure SIP") and by Tennessee on October 19, 2009 (the "Tennessee Infrastructure  
 17 SIP"). EPA Response to Plfs. SOF 76, 79. EPA thus has failed to perform a mandatory duty  
 18 to take action pursuant to 42 U.S.C. § 7410(k).  
 19  
 20

21 The Court may properly enter an order setting deadlines for EPA to perform the  
 22 obligations as to which it admits liability within the first and third claims. *See Natural Res.*  
 23 *Def. Council, Inc. v. Train*, 510 F.2d 692, 713 (D.C. Cir. 1975). Thus, the only dispute  
 24 between the parties as to these claims is about the length of time EPA should be given to  
 25 perform these obligations. In exercising its discretion to establish appropriate deadlines, this  
 26

27 <sup>7</sup> *See* note 3, *supra*, for the list of the 40 states.

28 <sup>8</sup> West Virginia is included in both the list of five states and the list of 44 states because it has submitted portions, but not all, of the contested infrastructure SIP. EPA Fact 5; *see supra*, note 2.

1 Court should consider the Agency's budgetary and manpower constraints, the importance of  
 2 not jeopardizing EPA's implementation of other mandatory duties, and the value of EPA's  
 3 issuing the findings of failure to submit and taking action on the Kentucky and Tennessee  
 4 SIP submittals at the same time. EPA respectfully requests that the Court set January 4, 2013  
 5 as the deadline for action for both of these claims.  
 6

7 **I. EPA IS NOT LIABLE ON CLAIM 1 FOR THE DELAWARE, IDAHO,**  
 8 **INDIANA, AND OREGON INFRASTRUCTURE SIP SUBMITTALS OR ON**  
 9 **PORTIONS OF THE WEST VIRGINIA INFRASTRUCTURE SIP**  
 10 **SUBMITTAL**

11 In their first claim, Plaintiffs allege that 44 states failed to submit infrastructure SIPs  
 12 addressing the 2008 ozone NAAQS, and that EPA failed to perform a mandatory duty by not  
 13 issuing findings of failure to submit for these states. Plfs. Mem. at 2 n.2, 13. Plaintiffs' list  
 14 includes Delaware, Idaho, Indiana, Oregon, and West Virginia. *Id.* However, these states  
 15 have now actually submitted the contested SIPs (or portions of those SIPs, in West Virginia's  
 16 case) and thus Plaintiffs' motion for summary judgment on this issue as to these states should  
 17 be denied and EPA's motion for summary judgment granted.

18 On February 1, 2012, Delaware submitted to EPA a SIP submittal intended to meet  
 19 the infrastructure requirements for the 2008 ozone NAAQS. EPA Fact 1. On September 15,  
 20 2008, June 25, 2010, and October 25, 2010, Idaho submitted to EPA a SIP submittal  
 21 intended to meet the infrastructure requirements for the 2008 ozone NAAQS. EPA Fact 2.  
 22 On December 12, 2011 and May 24, 2012, Indiana submitted to EPA a SIP submittal  
 23 intended to meet the infrastructure requirements for the 2008 ozone NAAQS. EPA Fact 3.  
 24 On June 23, 2010 and December 19, 2011, Oregon submitted to EPA a SIP submittal  
 25 intended to meet the infrastructure requirements for the 2008 ozone NAAQS. EPA Fact 4.  
 26 On February 17, 2012, West Virginia submitted to EPA a SIP submittal intended to meet the  
 27 infrastructure requirements addressing CAA sections 110(a)(2)(A)-(C), (D)(i)(II), (D)(ii),  
 28

(E)-(H), and (K)-(M) for the 2008 ozone NAAQS. EPA Fact 5.

Because these five states submitted the 2008 ozone NAAQS infrastructure SIPs or a portion of the required SIPs, EPA does not have a mandatory duty to issue findings of failure to submit regarding the above-referenced submissions from these states. Thus, the Court should grant summary judgment in EPA's favor with regard to the submissions from these five states.

## **II. THE COURT SHOULD ADOPT THE SCHEDULE PROPOSED BY EPA**

Aside from denying Plaintiffs' motion for summary judgment on the claim alleging that EPA failed to perform a mandatory duty to issue findings of failure to submit with regard to the 2008 ozone NAAQS infrastructure SIPs from Delaware, Idaho, Indiana, Oregon, and West Virginia, the only remaining question before this Court is what schedule the Court should impose for EPA: (1) to issue findings of failure to submit for any of the 40 remaining states at issue in this case that have not by that date submitted 2008 ozone NAAQS infrastructure SIPs to EPA; and (2) to take final action on the Kentucky Infrastructure SIP and the Tennessee Infrastructure SIP. EPA does not contest liability on these claims. However, the parties disagree on what deadlines the Court should set for EPA's actions.

A district court has broad discretion to fashion equitable remedies. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 310-13 (1982); *American Lung Ass'n*, 884 F. Supp. at 347. In a suit alleging violation of a Congressionally mandated duty, courts have recognized two types of circumstances that might make it infeasible for an agency to comply with a particular deadline: (1) the "budgetary . . . and manpower demands" required are "beyond the agency's capacity or would unduly jeopardize the implementation of other essential programs," and (2) the need for an agency to have more time to sufficiently evaluate complex technical issues. *Natural Res. Def. Council v. Train*, 510 F.2d at 712-13. When the agency



1 concludes that these types of constraints would require an extension of the deadline, it may  
 2 attempt to so demonstrate to the district court. *Id.* In *Train*, the D.C. Circuit reasoned that a  
 3 federal court in equity may exercise its discretion to extend a deadline if convinced that the  
 4 agency in question has “in good faith employed the utmost diligence in discharging [its]  
 5 statutory responsibilities,” since the Court’s discretion “does not embrace enforcement  
 6 through contempt of a party’s duty to comply with an order that calls him to do an  
 7 impossibility.” *Id.*

9           **A.     EPA’S PROPOSED SCHEDULE IS AS EXPEDITIOUS AS**  
 10           **POSSIBLE IN LIGHT OF THE AGENCY’S OTHER MANDATORY**  
 11           **OBLIGATIONS**

12           EPA’s Assistant Administrator for the Office of Air and Radiation, Regina McCarthy,  
 13 explains in detail in her attached Declaration the amount of time EPA requests: (1) to issue  
 14 findings of failure to submit, in whole or in part, for the 40 states that have not yet submitted  
 15 infrastructure SIPs addressing the 2008 ozone NAAQS; and (2) to take action under CAA  
 16 section 110(k), 42 U.S.C. § 7410(k), on the 2008 ozone NAAQS infrastructure SIPs already  
 17 submitted by Kentucky and Tennessee. EPA proposes to take final action on both duties by  
 18 January 4, 2013. EPA’s proposed schedule reflects the most expeditious timeframe by which  
 19 Ms. McCarthy, in her informed judgment, believes the Agency can perform these actions in  
 20 light of its budgetary constraints and other mandatory duties and obligations imposed by the  
 21 Clean Air Act.

22                           **1.     Time Needed for EPA to Issue Findings of Failure to Submit**

23           If EPA were to act in a vacuum on the finding as to whether the 40 states have  
 24 submitted the required SIPs, little time would be necessary. In other words, if EPA could  
 25 prioritize, *above other competing mandatory duties and obligations*, issuing findings of  
 26 failure to submit for States that have not yet submitted infrastructure SIPs addressing the  
 27  
 28



1 2008 ozone NAAQS, EPA would need approximately 30 business days to complete the  
 2 action. EPA Fact 6.

3 First, EPA staff must verify whether the states in question have made the specific  
 4 required SIP submission, which takes about 5 business days. McCarthy Decl. ¶ 10, Att. A.  
 5 States make SIP submissions on a rolling basis as they are able, and sometimes withdraw,  
 6 replace, or make supplemental SIP submissions. McCarthy Decl. ¶ 7. Next, EPA staff  
 7 create a draft findings notice and discuss it with the Agency's workgroup and all the affected  
 8 EPA Regional Offices. McCarthy Decl. ¶¶ 11-12. The draft findings notice lists and  
 9 describes the SIP submissions for all elements of CAA section 110(a)(2), 42 U.S.C. §  
 10 7410(a)(2), applicable to the particular action. McCarthy Decl. ¶ 11. Discussion within the  
 11 workgroup and the affected EPA Regional Offices ensures, among other things, that the  
 12 information in the draft findings notice is accurate and that EPA is addressing substantive  
 13 elements of CAA section 110(a)(2) consistently. McCarthy Decl. ¶¶ 11-12. EPA staff also  
 14 must create an electronic draft of the package of materials to be sent to the Office of the  
 15 Federal Register and, prior to transmitting the package, confirm that the states' most recent  
 16 SIP submission data are accurate (frequently EPA's preparation to issue a finding of failure  
 17 to submit results in a state making a submission). McCarthy Decl. ¶¶ 13-14. EPA then must  
 18 revise the Federal Register Notice as necessary, and route it for review and approval within  
 19 several offices within EPA: the Office of Air Quality Planning and Standards, the Office of  
 20 General Counsel to ensure the notice meets legal requirements, the Air Quality Policy  
 21 Division, and management within the Office of Air Quality Planning and Standards and the  
 22 Office of Air and Radiation (in EPA Headquarters). McCarthy Decl. ¶¶ 15-20. Finally, the  
 23 notice must be signed by the Assistant Administrator for the Office of Air and Radiation.  
 24 McCarthy Decl. ¶ 21. In total, EPA estimates that this process takes 30 business days. EPA  
 25  
 26  
 27  
 28

1 Fact 6. Assuming a conversion of 20 business days per month, this estimate translates into  
 2 1.5 months.

## 3 **2. Time Needed for EPA to Take Action on the Kentucky and** 4 **Tennessee Infrastructure SIPs**

5 In her Declaration, Ms. McCarthy also describes the amount of time EPA needs in  
 6 order to take action pursuant to CAA section 110(k), 42 U.S.C. § 7410(k), on the Kentucky  
 7 Infrastructure SIP and the Tennessee Infrastructure SIP submissions made by those states for  
 8 the 2008 ozone NAAQS. Again, looking at the necessary work in a vacuum, if EPA were to  
 9 prioritize these actions over other competing mandatory duties the Agency must perform,  
 10 EPA would need 139 business days to take action on the Kentucky Infrastructure SIP and  
 11 132 business days to take action on the Tennessee Infrastructure SIP (approximately 6.95 and  
 12 6.6 months, respectively). EPA Facts 7-8. EPA has more recently reviewed Tennessee's  
 13 existing SIP provisions for ozone, and thus less time is estimated to conduct such review.  
 14 McCarthy Decl. ¶ 34, Att. B n.1.

15  
 16 In taking final action on the 2008 ozone NAAQS infrastructure SIP submissions,  
 17 EPA staff must first review the SIP submissions against each applicable element of CAA  
 18 section 110(a)(2) and applicable regulations and guidance to determine whether the  
 19 infrastructure requirements have been met. McCarthy Decl. ¶ 25, Att. B. This review,  
 20 estimated to take 10 business days for Tennessee and 15 business days for Kentucky, entails  
 21 a substantive determination whether the SIP submission meets all applicable legal  
 22 requirements and whether the various SIP provisions cited in the SIP submission are either  
 23 included in the SIP submission itself or are already in the state's existing EPA-approved SIP,  
 24 and are correctly cited and described. *Id.* During this evaluation phase, EPA also must  
 25 collect supporting documentation and language and citations from previous SIP approvals  
 26 pertaining to specific substantive requirements. *Id.* If EPA identifies any questions  
 27  
 28

1 regarding the submission, EPA staff must engage in discussions with State staff. *Id.* This  
2 initial review also involves review by an EPA Regional staff attorney and, if necessary, EPA  
3 Headquarters staff and the EPA workgroup that addresses infrastructure SIPs for national  
4 consistency. *Id.*

5       Next, EPA staff must draft the proposed action on the infrastructure SIP submission,  
6 estimated to take 3 business days for Tennessee and 5 business days for Kentucky.

7 McCarthy Decl. ¶ 26, Att. B. If necessary, technical support documents or memoranda must  
8 be drafted for inclusion in the public docket to provide additional discussion and analysis.

9 *Id.* The draft proposed rule must then be routed through the necessary staff and managers  
10 within EPA Region 4 for concurrence before being signed by the Regional Administrator, a  
11 process estimated to take 10 business days. McCarthy Decl. ¶ 27, Att. B. Once the Regional  
12 Administrator has signed the notice of proposed action, it must be transmitted to the Office of  
13 Federal Register for publication, estimated to take 2 business days. McCarthy Decl. ¶ 28,  
14 Att. B. Typically, a proposed rule is published in the Federal Register within 10 business  
15 days, although this publication time, which is beyond EPA's control, can take longer.

16 McCarthy Decl. ¶ 29, Att. B.

17       Once the proposed notice has been published in the Federal Register, a public  
18 comment period of 30 calendar days begins. McCarthy Decl. ¶ 30, Att. B. Because EPA  
19 allows two additional business days to accommodate any timely comments submitted by U.S.  
20 Mail, the estimated number of business days for the public comment period is 24 business  
21 days. McCarthy Decl. ¶ 30, Att. B. After the close of the public comment period, EPA staff  
22 review, analyze, and respond to comments, estimated to take approximately 50 business  
23 days. McCarthy Decl. ¶ 31, Att. B. Reviewing and responding to comments involves  
24 reviewing previous rulemakings to determine whether EPA has previously addressed the  
25  
26  
27  
28

1 issues raised in the comments, resolving the Agency's position on issues through the  
 2 infrastructure SIPs workgroup, convening a sub-workgroup, and discussing the issues with  
 3 management as necessary. McCarthy Decl. ¶ 31.

4       Next, EPA must draft and internally circulate the final Federal Register notice, which  
 5 takes about 23 business days. McCarthy Decl. ¶¶ 32-33, Att. B. EPA may need to draft  
 6 additional technical support documents or memoranda to support the final action. McCarthy  
 7 Decl. ¶ 32. EPA anticipates that final action on the infrastructure SIP submissions for the  
 8 2008 ozone NAAQS will have nationwide factual, policy, and legal implications, requiring  
 9 consultation with multiple offices within EPA to ensure national consistency. *Id.* Routing  
 10 for a final rule typically requires more time than routing for a proposed rule because if any  
 11 adverse comments are received, EPA Headquarters' Office of General Counsel must review  
 12 the Agency's response to comments and more closely evaluate whether the proposed action  
 13 should be finalized, modified, or halted for further evaluation and administrative process.  
 14 McCarthy Decl. ¶¶ 32-33, Att. B.

15       In total, the estimated time for EPA to act on the Tennessee infrastructure SIP is 132  
 16 business days, and 139 business days to act on the Kentucky infrastructure SIP  
 17 (approximately 6.6 and 6.95 months respectively, assuming 20 business days per month).  
 18 *See* EPA Facts 7-8. Again, these estimates presume – contrary to reality – that EPA could  
 19 prioritize these actions over other mandatory obligations. *Id.*

### 20                               **3. Time Needed for EPA Action In Light of Competing Agency** 21                               **Priorities**

22       Unfortunately, because EPA has numerous other obligations it must perform pursuant  
 23 to statutory mandates, it would not be taking the actions at issue in this case in a vacuum  
 24 where there are no other demands on agency resources. *Natural Res. Def. Council v. Train*,  
 25 the leading case on the issue of agency failure to meet statutory deadlines, establishes that  
 26  
 27  
 28

1 “budgetary commitments and manpower demands” are a legitimate constraint on an agency’s  
 2 ability to meet a statutory deadline when they are “beyond the agency’s capacity or would  
 3 unduly jeopardize the implementation of other essential programs.” 510 F.2d at 712. As Ms.  
 4 McCarthy describes in her Declaration, EPA’s air pollution program is currently burdened by  
 5 an extraordinarily large number of mandatory actions that affect the resources available to  
 6 make the findings of failure to submit or to act upon the Kentucky and Tennessee  
 7 infrastructure SIP submissions at issue in this case. EPA Fact 9. In light of the competing  
 8 demands on EPA air program resources, EPA believes that a deadline of January 4, 2013,  
 9 reflects the most expeditious schedules that EPA can reasonably meet under the  
 10 circumstances without jeopardizing completion of EPA’s many other mandatory duties.  
 11 McCarthy Decl. ¶ 46. Aligning the dates for action on issuing the findings of failure to  
 12 submit and taking action on the Kentucky Infrastructure SIP and the Tennessee Infrastructure  
 13 SIP will also allow EPA to address most efficiently the potential outcomes of taking these  
 14 actions.  
 15

16  
 17 **a. Competing Mandatory Obligations EPA Must Perform**

18 Ms. McCarthy describes several different measures of the mandatory activities EPA  
 19 is already obligated to perform in the remainder of 2012. One such measure is the Fall 2011  
 20 Semiannual Regulatory Agenda, which summarizes agency regulatory priorities and  
 21 activities planned in the coming year. McCarthy Decl. ¶ 37, Att. C. The Fall 2011 Agenda  
 22 lists 120 individual air program projects and provides the target completion dates for each  
 23 project. McCarthy Decl. ¶ 37, Att. C. While not each project on this list is mandatory, many  
 24 of them are. *See* McCarthy Decl. ¶ 37.  
 25

26 Another measure of the large volume of mandatory air program projects EPA is  
 27 currently performing comes from the number of Consent Decrees and Settlement  
 28

1 Agreements establishing dates for action that EPA is already obligated to fulfill. McCarthy  
 2 Decl. ¶ 38, Att. D. Between January 2012 and the end of the year, the list contains  
 3 approximately 128 individual items for action that EPA must undertake pursuant to Consent  
 4 Decree or Settlement Agreement. *Id.* However, the number of items does not reflect the  
 5 complexity of the tasks. For example, one item is the promulgation of the nationwide  
 6 designations for the 2008 ozone NAAQS by May 31, 2012, which required EPA to evaluate  
 7 all areas of the country to determine which were violating the NAAQS. *Id.* This mandatory  
 8 undertaking involved an in-depth factual and analytical process, and resulted in 45 areas  
 9 being designated as nonattainment. *Id.* As another example, EPA is subject to a Settlement  
 10 Agreement in *Sierra Club et al. v. Jackson*, No. 3:10-cv-04060-CRB (N.D. Cal.), which  
 11 obligates EPA to act on submitted infrastructure SIP submissions, or to promulgate a federal  
 12 implementation plan, or some combination of both, for the 1997 8-hour ozone NAAQS for  
 13 16 states in July and October of this year. McCarthy Decl. ¶ 39. EPA is also subject to a  
 14 Consent Decree in *WildEarth Guardians et al. v. Jackson*, No. 3:11-cv-00190-WHA (N.D.  
 15 Cal.), obligating the Agency to act on infrastructure SIPs for the 2006 24-hour PM<sub>2.5</sub>  
 16 NAAQS for 20 states. McCarthy Decl. ¶ 39. Under that Decree, EPA must still take final  
 17 action on SIP submissions from 19 states in September of this year, which requires a  
 18 substantial commitment of agency resources. *Id.* Although Plaintiffs in this case point to  
 19 these types of Consent Decree and Settlement Agreement obligations as evidence of EPA's  
 20 "delay" in implementing the Clean Air Act, *see* Plfs. Mem. at 17, these court-ordered  
 21 obligations to perform non-discretionary duties represent a significant obligation of the  
 22 Agency's limited budgetary and manpower resources.

23  
 24 In addition to actions EPA must take pursuant to Consent Decree and Settlement  
 25 Agreement obligations, EPA has a substantial number of actions related to SIPs the Clean  
 26  
 27  
 28

1 Air Act requires the Agency to take. In each of the three most recent years (2009 to 2011),  
 2 EPA has received on average 310 SIP submissions from states nationwide, and on average  
 3 has acted on 198 submissions. McCarthy Decl. ¶ 39, Att. E.<sup>9</sup> So far in calendar year 2012,  
 4 EPA has already published in the Federal Register approximately 273 regulatory actions  
 5 related to SIPs. McCarthy Decl. ¶ 39, Att. F. As with the actions EPA must take pursuant to  
 6 Consent Decrees and Settlement Agreements, EPA's statutorily mandated actions on SIPs do  
 7 not necessarily reflect the significant level of resources and time that many of these actions  
 8 require. McCarthy Decl. ¶ 39.

10 There are numerous other tasks EPA is performing pursuant to statutory requirements  
 11 between now and the end of 2012. For example, EPA has a mandatory duty under CAA  
 12 section 109 to review the NAAQS at five-year intervals; EPA has not completed that duty for  
 13 the review of the PM NAAQS and has been sued to establish a schedule for EPA to complete  
 14 the review. *American Lung Ass'n v. EPA*, No. 1:12-cv-00243-RLW and No. 1:12-cv-00531  
 15 (D.D.C.); McCarthy Decl. ¶ 41. The rulemaking at issue in that case is extremely complex,  
 16 and has consumed and will continue to consume a substantial investment of the Agency's  
 17 resources under the schedule that EPA has moved the court to adopt, which represents the  
 18 most expeditious EPA can reasonably meet under the circumstances. McCarthy Decl. ¶ 41.  
 19 Uncertainty exists, however, as the plaintiffs have moved the court to adopt a much shorter  
 20 schedule, which EPA has informed the court would not allow the Agency a reasonable  
 21 possibility of compliance. *Id.* As of the filing of this brief, oral argument in that case is  
 22 scheduled for May 31, 2012, and an order will likely issue shortly thereafter.

25 EPA is also already working under numerous court-ordered deadlines for mandatory  
 26

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27 <sup>9</sup> The SIPs submitted in a given year and the SIPs acted upon in a given year are usually not the  
 28 same SIP submissions, due to the time necessary for administrative actions on SIPs. *See*  
 McCarthy Decl. Att. E n.1.

1 statutory duties related to the Agency's Regional Haze program, air toxics program,  
 2 greenhouse gases, and the Cross-State Air Pollution Rule. McCarthy Decl. ¶¶ 40, 42-44.  
 3 Within each of these program areas are a multitude of statutorily-required obligations EPA  
 4 must perform, including complex rulemakings with voluminous administrative records,  
 5 permit actions, and responding to petitions for reconsideration of rulemakings. *See generally*  
 6 McCarthy Decl. ¶¶ 40, 42-44. EPA is already subject to multiple Consent Decrees related to  
 7 the Regional Haze program, under which the Agency must either take action on specific SIP  
 8 submissions, or promulgate a federal implementation plan, or some combination of the two.  
 9 McCarthy Decl. ¶ 40. These rulemakings are extremely complex and resource intensive, and  
 10 are frequently controversial, leading to additional litigation and strain on the Agency's  
 11 resources. McCarthy Decl. ¶ 40.

12  
 13 Despite EPA's many competing mandatory obligations, the Agency has started  
 14 working on taking action on the Kentucky and Tennessee infrastructure SIPs, thus exercising  
 15 diligence in discharging its statutory duties. McCarthy Decl. ¶¶ 23, 46; *see Train*, 510 F.2d  
 16 at 713. EPA believes that the most expeditious schedule by which it can complete these  
 17 actions is January 4, 2013. McCarthy Decl. ¶ 46.

18  
 19 **b. Efficiencies From Tying Final Action for the Duties in this**  
 20 **Suit to a Single Date**

21 EPA believes that there would be significant benefit if the Court were to set a single  
 22 date for taking final action on the duties at issue in this case: making findings of failure to  
 23 submit for the 40 states that have not yet submitted infrastructure SIPs (or portions of SIPs)  
 24 addressing the 2008 ozone NAAQS, and taking final action on the Kentucky Infrastructure  
 25 SIP and the Tennessee Infrastructure SIP. McCarthy Decl. ¶ 45. Plaintiffs, too,  
 26 acknowledge the importance of keeping actions on SIPs from Kentucky and Tennessee on a  
 27 schedule closely linked to the date for action on the findings of failure to submit for the other  
 28



1 states. *See* Plfs. Mem. at 22-23.

2 EPA is concerned about efficiency and the consequences that may ensue from making  
 3 the findings of failure to submit and from taking action on the infrastructure SIP submissions  
 4 of Tennessee and Kentucky. McCarthy Decl. ¶ 45. Any one of these actions would trigger  
 5 the start of a 24-month schedule for EPA to promulgate a federal implementation plan for  
 6 that state for the unmet infrastructure SIP obligations. *See* 42 U.S.C. § 7410(c)(1). In  
 7 particular, any federal implementation plan addressing the requirements of CAA section  
 8 110(a)(2)(D)(i), 42 U.S.C. § 7410(a)(2)(D)(i), which has to do with prohibiting interstate  
 9 transport of pollutants, would impose a significant resource burden on EPA. McCarthy Decl.  
 10 ¶ 45. In the event that EPA makes a finding of failure to submit for the infrastructure SIPs  
 11 for the 2008 Ozone NAAQS for a large number of states, and in the event that EPA  
 12 disapproves the specific infrastructure SIP submissions for the 2008 Ozone NAAQS for  
 13 Tennessee and Kentucky at issue in this case, with respect to section 110(a)(2)(D)(i), it  
 14 would be preferable to have the 24 month schedule for the federal implementation plans for  
 15 all of the affected states run contemporaneously. McCarthy Decl. ¶ 45. Having the  
 16 schedules end at the same point will allow EPA to address the important issue of interstate  
 17 transport for the 2008 ozone NAAQS most efficiently, for both the states and EPA, because  
 18 the Agency will have the opportunity to address the issue of regional transport of ozone and  
 19 ozone precursors among the affected states in one combined regional effort, rather than  
 20 piecemeal and on divergent schedules that could lead to less effective outcomes. McCarthy  
 21 Decl. ¶ 45.

22  
 23  
 24  
 25 **B. PLAINTIFFS' PROPOSED SCHEDULE WOULD JEOPARDIZE**  
 26 **EPA'S PERFORMANCE OF OTHER, NON-DISCRETIONARY**  
 27 **ACTIONS**

28 Plaintiffs request that this Court issue an order requiring EPA: (1) to make the

1 findings of failure to submit within 30 days of the issuance of the Court's order; and (2) to  
 2 issue a proposed rule taking action on the Kentucky Infrastructure SIP and the Tennessee  
 3 Infrastructure SIP within three months and a final rule within five months of the issuance of  
 4 the Court's order. Plfs. Mem. at 22-24. These schedules are not feasible and would  
 5 jeopardize EPA's performance of other mandatory obligations. McCarthy Decl. ¶ 46.

6  
 7 In setting schedules for the performance of mandatory duties agencies have missed,  
 8 courts have acknowledged the need to enter a schedule that allows the agency to perform the  
 9 duty within a reasonable period of time. *See, e.g., Sierra Club v. Johnson*, 444 F. Supp. 2d  
 10 46, 58-59 (D.D.C. 2006) (observing that the plaintiff's proposed schedule "is simply too  
 11 compressed . . . to afford any reasonable possibility of compliance" and ordering a schedule  
 12 that was "more relaxed" than that proposed by plaintiff but "significantly more expedited  
 13 than that sought by the defendant"); *Natural Res. Def. Council, Inc. v. New York State Dep't*  
 14 *of Entl. Conservation*, 700 F. Supp. 173, 181 (S.D.N.Y. 1988) (allowing the agency a  
 15 "reasonable period of time" in recognition of the necessity of "dealing with the issues on a  
 16 pragmatic basis").

17  
 18 Although superficially Plaintiffs' and EPA's estimates for the time necessary to issue  
 19 a finding of failure to submit are similar (30 calendar days estimated by Plaintiffs; 30  
 20 business days – or 1.5 months – estimated by EPA), these estimates do not account for EPA's  
 21 heavy burden of other non-discretionary obligations, described above in Section II.A.3.a.  
 22 Nor do Plaintiffs' schedules reflect the current serious financial and budgetary realities which  
 23 require EPA to prioritize and schedule projects. McCarthy Decl. ¶ 46. However, Plaintiffs  
 24 acknowledge that EPA would need a longer period of time to take final action on the  
 25 Kentucky and Tennessee SIP submissions than on the findings of failure to submit, as action  
 26 on the Kentucky and Tennessee submissions must undergo notice and comment rulemaking.  
 27  
 28

1 See Plfs. Mem. at 23. Plaintiffs further acknowledge the benefit of having EPA take action  
2 on the findings of failure to submit and action on the Kentucky Infrastructure SIP and the  
3 Tennessee Infrastructure SIP at at least roughly the same time due to the likelihood of EPA  
4 having to promulgate federal implementation plans for multiple states simultaneously to  
5 address interstate pollution. Plfs. Mem. at 22-23. For these reasons, EPA asks the Court to  
6 set the date for the Agency to make the findings of failure to submit on the same date as the  
7 Agency takes action on the Kentucky and Tennessee SIPs.

9 Plaintiffs' request that the Court to order EPA to take final action on the Kentucky  
10 Infrastructure SIP and the Tennessee Infrastructure SIP is not feasible, both in light of how  
11 long it takes EPA to take such actions and because of EPA's competing mandatory  
12 obligations. As EPA described above, taking action on these SIPs would take approximately  
13 6.5 to 7 months. Plaintiffs' rationale for why they believe EPA needs only five months to act  
14 on the Kentucky and Tennessee SIP submissions is not persuasive. For example, Plaintiffs  
15 argue that EPA's review of the SIP submissions should not take long because EPA recently  
16 reviewed the infrastructure SIP for the 1997 ozone NAAQS, and presumably that prior SIP  
17 submission already addressed most of the elements relevant for the infrastructure SIP for the  
18 2008 ozone NAAQS. Plfs. Mem. at 23. However, as Plaintiffs themselves note, a critical  
19 difference arises under the interstate pollution provisions in 42 U.S.C. § 7410(a)(2)(D)(i). As  
20 EPA describes above, addressing interstate pollution is complicated and resource intensive.  
21 In addition, Plaintiffs' opinion that Kentucky and Tennessee's submittals are "obviously  
22 flawed" improperly assumes the substantive outcome of EPA's consideration, *see* Plfs. Mem.  
23 at 24, and does not provide a justification for EPA to depart from the full, required  
24 administrative process of reviewing the SIPs. It is EPA's decision on the issue, as informed  
25 by the full public comment process, rather than Plaintiffs' preliminary opinion, that  
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ultimately will decide this question. In particular, Plaintiffs fail to take into consideration that once EPA begins the process of reviewing these submissions, the states in question may elect to make additional SIP submissions to address section 110(a)(2)(D)(i) in some other fashion, and that in the rulemaking process, the states or other commenters may submit comments or analyses on this issue that EPA will be required to address during the rulemaking process. In addition, there may be other substantive concerns with respect to other elements of section 110(a)(2) in the states' infrastructure SIP submissions that may come to light during the rulemaking process.

In light of the competing demands on EPA air program resources, EPA believes that a deadline of January 4, 2013, reflects the most expeditious schedules that EPA can reasonably meet under the circumstances. McCarthy Decl. ¶ 46. To give greater priority to these actions would affect EPA's ability to meet these obligations in a timely or effective fashion, and would jeopardize the completion of the many other mandatory duties that EPA is already obligated to complete by the end of this calendar year. *Id.* Setting the schedules so that they will end contemporaneously is also the most efficient and appropriate approach, because of the obligations that may arise from the potential outcome of those actions.

## CONCLUSION

For the reasons stated above and in the accompanying declaration of Regina McCarthy, EPA's cross-motion for summary judgment should be granted, and the Court should enter an order:

- (1) entering summary judgment in favor of EPA on Plaintiffs' claim that EPA has failed to issue a finding of failure to submit an "infrastructure" state implementation plan ("SIP") for the 2008 ozone national ambient air quality standards ("NAAQS") for the states of Delaware, Idaho, Indiana, Oregon, and West Virginia (for CAA

sections 110(a)(2)(A)-(C),(D)(i)(II), (D)(ii), (E)-(H), and (K)-(M) only); and  
 dismissing those claims pursuant to Fed. R. Civ. P. 56.

(2) directing EPA to:

- a. By no later than January 4, 2013, sign a notice finding that the following States have failed to submit “infrastructure” SIPs for the 2008 ozone NAAQS: Arizona, Arkansas, California, Colorado, Connecticut, District of Columbia, Hawaii, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, Puerto Rico, Rhode Island, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia (for CAA section 110(a)(2)(D)(i)(I) only), Wisconsin, and Wyoming;
- b. By no later than January 4, 2013, sign for publication in the Federal Register a notice of the Agency’s final action pursuant to Section 110(k) of the Clean Air Act, 42 U.S.C. § 7410(k), approving, disapproving, or approving in part and disapproving in part (a) the infrastructure SIP submittal submitted by Kentucky dated September 8, 2009 addressing the 2008 ozone NAAQS and (b) the infrastructure SIP submittal submitted by Tennessee dated October 19, 2009 addressing the 2008 ozone NAAQS.

EPA further requests that any order issued for purposes of the requirements of paragraphs (2)(a) and (b) above include the following clarification: “It is understood that an infrastructure SIP does not include that portion of section 110(a)(2)(C), 42 U.S.C. §

1 7410(a)(2)(C), that pertains to nonattainment area plan requirements under part D. It is  
 2 further understood that in the event that a state makes a complete infrastructure SIP  
 3 submission meeting the requirements of section 110(a)(2), as applicable, in whole or in part,  
 4 then EPA no longer has the legal authority or the obligation pursuant to section 110(k)(1)(B),  
 5 42 U.S.C. § 7410(k)(1)(B), to make a finding of failure to submit with respect to that state  
 6 and to those elements of the infrastructure SIP submission for which the state made such  
 7 submission. In addition, it is understood that if a state withdraws, in whole or in part, a  
 8 submitted infrastructure SIP, then EPA no longer has the legal authority or the obligation  
 9 pursuant to section 110(k), 42 U.S.C. § 7410(k) to take action on such SIP.”  
 10  
 11  
 12

13 Respectfully submitted,

14 IGNACIA S. MORENO  
 15 Assistant Attorney General  
 Environment and Natural Resources Division

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21 *Attorneys for Defendant*

22 Of Counsel:

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 United States Environmental Protection Agency  
 Office of General Counsel  
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**CERTIFICATE OF SERVICE**

I certify that on May 29, 2012, a true and correct copy of the foregoing  
DEFENDANT'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT  
AND MEMORANDUM IN SUPPORT THEREOF was served electronically via the Court's  
e-filing system to Counsel of Record.

/s/ Christina L. Richmond  
CHRISTINA L. RICHMOND